

Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol.

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mr. CARDIN:

S. 4050. A bill to amend the Classified Information Procedures Act to improve the protection of classified information and for other purposes; to the Committee on the Judiciary.

Mr. CARDIN. Mr. President, the Classified Information Procedures Act, CIPA, was enacted in 1980 with bipartisan support to address the “disclose or dismiss” dilemma that arose in espionage prosecutions when a defendant would threaten the government with the disclosure of classified information if the government did not drop the prosecution. Previously, there were no congressionally mandated procedures that required district courts to make discovery and admissibility rulings regarding classified information in advance.

CIPA has worked reasonably well during the last 30 years, but some issues have arisen in a number of notable terrorism, espionage, and narcotics cases that demonstrate that reforms and improvements could be made to ensure that classified sources, methods, and information can be protected and to ensure that a defendant’s due process and fair trial rights are not violated. In 2009, when the Congress enacted the Military Commissions Act, MCA, the Congress drew heavily from the manner in which the Federal courts interpreted CIPA when it updated the procedures governing the use of classified information in military commission prosecutions. At that time, however, the Congress did not update CIPA. Indeed, since its enactment in 1980, there have been no changes to the key provisions of CIPA.

As chairman of the Senate Judiciary’s Terrorism and Homeland Security Subcommittee, I have chaired a number of hearings during which witnesses have testified about the capacity of our civilian courts to try alleged terrorists and spies. The first subcommittee hearing that I chaired was on July 28, 2009, and was entitled “Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond.” The second Terrorism and Homeland Security Subcommittee hearing that I chaired was on May 12, 2010, and was entitled “The Espionage Statutes: A Look Back and A Look Forward.” The testimony I have heard in regard to terrorism, espionage, and our civilian courts has convinced me that while our courts have the capacity and the procedures in place to try alleged terrorists and spies, reforms and improvements could be made to CIPA to codify and clarify the decisions of the Federal courts.

As a result, today I am introducing the CIPA Reform and Improvement

Act, CRIA, of 2010. CRIA contains reforms and improvements to ensure that the statute maintains the proper balance between the protection of classified sources, methods and information, and a defendant’s constitutional rights. Among other things, this legislation, which includes the applicable changes that the Congress made when it enacted the Military Commissions Act of 2009, will codify, clarify, and unify Federal case law interpreting CIPA; ensure that all classified information, not just documents, will be governed by CIPA; ensure that prosecutors and defense attorneys will be able to fully inform trial courts about classified information issues; and will clarify that the civil state secrets privilege does not apply in criminal cases. CRIA will also ensure high-level DOJ approval before the government invokes its classified information privilege in criminal cases and will ensure that the Federal courts will order the disclosure and use of classified information when the disclosure and use meets the applicable legal standards. This legislation will also ensure timely appellate review of lower court CIPA decisions before the commencement of a trial, explicitly permit trial courts to adopt alternative procedures for the admission of classified information in accordance with a defendant’s fair trial and due process rights, and make technical fixes to ensure consistent use of terms throughout the statute.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 4050

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; DEFINITIONS.

(a) **SHORT TITLE.**—This Act may be cited as the “Classified Information Procedures Reform and Improvement Act of 2010”.

(b) **IN GENERAL.**—Section 1 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) by redesignating subsection (b) as subsection (c); and

(2) by inserting after subsection (a) the following:

“(b) ‘Disclosure’, as used in this Act, includes the release, transmittal, or making available of, or providing access to, classified information to any person (including a defendant or counsel for a defendant) during discovery, or to a participant or member of the public at any proceeding.”.

(c) **TECHNICAL AND CONFORMING AMENDMENT.**—Section 501(3) of the Immigration and Nationality Act (8 U.S.C. 1531(3)) is amended by striking “section 1(b)” and inserting “section 1”.

SEC. 2. PRETRIAL CONFERENCE.

Section 2 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) by inserting “(a) IN GENERAL.—” before “At any time”; and

(2) by adding at the end the following:

“(b) **EX PARTE.**—If the United States or the defendant certifies that the presence of both parties at a pretrial conference would harm the national security of the United States or

the defendant’s ability to make a defense, then upon request by either party, the court shall hold such pretrial conference ex parte, and shall seal and preserve the record of that ex parte conference in the records of the court for use in the event of an appeal.”.

SEC. 3. PROTECTIVE ORDERS.

Section 3 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) by inserting “(a) IN GENERAL.—” before “Upon motion”; and

(2) by inserting “use or” before “disclosure”; and

(3) by inserting “, or access to,” after “disclosure of”; and

(4) by inserting “, or any classified information derived therefrom, that will be” after “classified information”; and

(5) by inserting “or made available” after “disclosed”; and

(6) by adding at the end the following:

“(b) **NOTICE.**—In the event the defendant is convicted, the United States shall provide the defendant and the appellate court with a written notice setting forth each date that the United States obtained a protective order.”.

SEC. 4. DISCOVERY OF AND ACCESS TO CLASSIFIED INFORMATION BY DEFENDANTS.

Section 4 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) in the section heading, by inserting “AND ACCESS TO” after “DISCOVERY OF”; and

(2) by inserting “(a) IN GENERAL.—” before “The court, upon”; and

(3) in the first sentence—

(A) by inserting “to restrict the defendant’s access to or” before “to delete”; and

(B) by striking “from documents”; and

(C) by striking “classified documents, or” and inserting “classified information,”; and

(D) by striking the period at the end and inserting “, or to provide other relief to the United States.”;

(4) in the second sentence, by striking “alone.” inserting “alone, and may permit ex parte proceedings with the United States to discuss that request.”;

(5) in the third sentence—

(A) by striking “If the court enters an order granting relief following such an ex parte showing, the” and inserting “The”; and

(B) by inserting “, and the transcript of any argument and any summary of the classified information the defendant seeks to obtain discovery of or access to,” after “text of the statement of the United States”; and

(6) by adding at the end the following:

“(b) **ACCESS TO OTHER CLASSIFIED INFORMATION.**—If the defendant seeks access to non-documentary information from a potential witness or other person through deposition under the Federal Rules of Criminal Procedure, or otherwise, which the defendant knows or reasonably believes is classified, the defendant shall notify the attorney for the United States and the court in writing. Such notice shall specify with particularity the nondocumentary information sought by the defendant and the legal basis for such access.

“(c) **SHOWING BY THE UNITED STATES.**—In any prosecution in which the United States seeks to restrict, delete, withhold, or otherwise obtain relief with respect to the defendant’s discovery of or access to any specific classified information, the attorney for the United States shall file with the court a declaration made by the Attorney General invoking the United States classified information privilege, which shall be supported by a declaration made by a knowledgeable United States official possessing the authority to classify information that sets forth the identifiable damage to the national security that

the discovery of, or access to, such information reasonably could be expected to cause.

“(d) STANDARD FOR DISCOVERY OF OR ACCESS TO CLASSIFIED INFORMATION.—Upon the submission of a declaration of the Attorney General under subsection (c), the court may not authorize the defendant’s discovery of, or access to, classified information, or to the substitution submitted by the United States, which the United States seeks to restrict, delete, or withhold, or otherwise obtain relief with respect to, unless the court first determines that such classified information or such substitution would be—

“(1) noncumulative, relevant, and helpful to—

“(A) a legally cognizable defense;

“(B) rebuttal of the prosecution’s case; or

“(C) sentencing; or

“(2) noncumulative and essential to a fair determination of a pretrial proceeding.

“(e) SECURITY CLEARANCE.—Whenever a court determines that the standard for discovery of or access to classified information by the defendant has been met under subsection (d), such discovery or access may only take place after the person to whom discovery or access will be granted has received the necessary security clearances to receive the classified information, and if the classified information has been designated as sensitive compartmented information or special access program information, any additional required authorizations to receive the classified information.”.

SEC. 5. NOTICE OF DEFENDANT’S INTENTION TO DISCLOSE CLASSIFIED INFORMATION.

Section 5 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) in the section heading, by inserting “USE OR” before “DISCLOSURE”;

(2) in subsection (a)—

(A) in the first sentence—

(i) by inserting “use or” before “disclose”; and

(ii) by striking “thirty days prior to trial” and inserting “45 days prior to such proceeding”;

(B) in the second sentence by striking “brief” and inserting “specific”;

(C) in the third sentence—

(i) by inserting “use or” before “disclose”; and

(ii) by striking “brief” and inserting “specific”; and

(D) in the fourth sentence—

(i) by inserting “use or” before “disclose”; and

(ii) by inserting “reasonably” before “believed”; and

(3) in subsection (b), by inserting “the use or” before “disclosure”.

SEC. 6. PROCEDURE FOR CASES INVOLVING CLASSIFIED INFORMATION.

Section 6 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) in subsection (a)—

(A) in the second sentence, by striking “such a hearing.” and inserting “a hearing and shall make all such determinations prior to proceeding under any alternative procedure set out in subsection (d).”; and

(B) in the third sentence, by striking “petition” and inserting “request”;

(2) in subsection (b)(2) by striking “trial” and inserting “the trial or pretrial proceeding”;

(3) by redesignating subsections (c), (d), (e), and (f), as subsections (d), (e), (f), and (g), respectively;

(4) by inserting after subsection (b) the following:

“(c) STANDARD FOR ADMISSIBILITY, USE AND DISCLOSURE AT TRIAL.—Classified information which is the subject of a notice by the

United States pursuant to subsection (b) is not admissible at trial and subject to the alternative procedures set out in subsection (d), unless a court first determines that such information is noncumulative, relevant, and necessary to an element of the offense or a legally cognizable defense, and is otherwise admissible in evidence. Classified information may not be used or disclosed at trial by the defendant unless a court first determines that exclusion of the classified information from such use or disclosure would deprive the defendant of a fair trial or violate the defendant’s right to due process.”;

(5) in subsection (d), as so redesignated—

(A) in the subsection heading, by inserting “USE OR” before “DISCLOSURE”;

(B) in paragraph (1), by inserting “use or” before “disclosure” both places that term appears;

(C) in the flush paragraph following paragraph (1)(B), by inserting “use or” before “disclosure”; and

(D) in paragraph (2)—

(i) by striking “an affidavit of” and inserting “a declaration by”;

(ii) by striking “such affidavit” and inserting “such declaration”; and

(iii) by inserting “the use or” before “disclosure”;

(6) in subsection (e), as so redesignated, in the first sentence, by striking “disclosed or elicited” and inserting “used or disclosed”; and

(7) in subsection (f), as so redesignated—

(A) in the subsection heading, by inserting “USE OR” before “DISCLOSURE” both places that term appears;

(B) in paragraph (1)—

(i) by striking “(c)” and inserting “(d)”;

(ii) by striking “an affidavit of” and inserting “a declaration by”;

(iii) by inserting “the use or” before “disclosure”; and

(iv) by striking “disclose” and inserting “use, disclose,”; and

(C) in paragraph (2), by striking “disclosing” and inserting “using, disclosing,”; and

(8) in the first sentence of subsection (g), as so redesignated—

(A) by inserting “used or” before “disclosed”; and

(B) by inserting “or disclose” before “to rebut the”.

SEC. 7. INTERLOCUTORY APPEAL.

Section 7(a) of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) by striking “disclosure of” both times that places that term appears and inserting “use, disclosure, discovery of, or access to”; and

(2) by adding at the end the following:

“The right of the United States to appeal pursuant to this Act applies without regard to whether the order or ruling appealed from was entered under this Act, another provision of law, a rule, or otherwise. Any such appeal may embrace any preceding order, ruling, or reasoning constituting the basis of the order or ruling that would authorize such use, disclosure, or access. Whenever practicable, appeals pursuant to this section shall be consolidated to expedite the proceedings.”.

SEC. 8. INTRODUCTION OF CLASSIFIED INFORMATION.

Section 8 of the Classified Information Procedures Act (18 U.S.C. App.) is amended—

(1) in subsection (b), by adding at the end “The court may fashion alternative procedures in order to prevent such unnecessary disclosure, provided that such alternative procedures do not deprive the defendant of a

fair trial or violate the defendant’s due process rights.”; and

(2) by adding at the end the following:

“(d) ADMISSION OF EVIDENCE.—(1) No classified information offered by the United States and admitted into evidence shall be presented to the jury unless such evidence is provided to the defendant.

“(2) Any classified information admitted into evidence shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.”.

SEC. 9. APPLICATION TO PROCEEDINGS.

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any prosecution pending in any United States district court.

AMENDMENTS SUBMITTED AND PROPOSED

SA 4892. Mr. KYL submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on April 8, 2010, with Protocol; which was ordered to lie on the table.

SA 4893. Mr. KYL submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4894. Mr. ALEXANDER submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4895. Mr. WICKER (for himself and Mr. KYL) submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4896. Mr. ENSIGN submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4897. Mr. ENSIGN submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4898. Mr. ENSIGN submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4899. Mr. ENSIGN submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4900. Mr. MCCAIN (for himself and Mr. CORKER) submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4901. Mr. DEMINT submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4902. Mr. DEMINT submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4903. Mr. DEMINT submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra; which was ordered to lie on the table.

SA 4904. Mr. CORKER submitted an amendment intended to be proposed by him to Treaty Doc. 111-5, supra.

SA 4905. Mr. CORKER submitted an amendment intended to be proposed by him to